

California Dreaming:

2008 ADA Amendments Make Federal Law More Like the Republic of California, Where Virtually Every Employee Can Claim a Disability

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In September 2000, the Governor of California signed into law AB 2222 (the Poppink Act), which specifically found that the definitions of “physical disability” and “mental disability” under state law were distinct from the definitions under federal law. For all practical purposes, California legislatively reversed the Sutton Trilogy of cases. With the legislative change, California plaintiffs simply filed their employment discrimination claims under California’s Fair Employment and Housing Act (FEHA).

Moving Towards The Left Coast

Eight years later, in late September 2008, President Bush signed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) into law. Now, the rest of the country is much closer to California in terms of who is considered disabled. The ADAAA became effective January 1, 2009. In short, the ADAAA formally reversed the 1999 Sutton Trilogy of U.S. Supreme Court cases, which were known to be employer friendly. These cases had required lower courts to apply a tough standard in determining if a plaintiff was sufficiently disabled to advance an ADA lawsuit. (Under the ADA’s formerly-applied rigid requirements, persons with some disabilities were denied protection under the ADA. This included insulin-dependent diabetics, amputees who had prosthetics, person’s with bipolar disorders if it was managed with medication, epileptics who managed their condition with medication, and even some persons with cancer.) The ADAAA also overturned the EEOC regulation that had instructed courts to determine whether an employee was disabled without considering mitigating measures. Before the ADAAA, disability advocates claimed that plaintiffs faced a Catch-22 – they were either considered not disabled enough to file a lawsuit (and receive ADA protection), or they were too disabled to be qualified for the job in question.

Prior to the new amendment, to be disabled under the ADA an employee had to show that (a) he/she had an impairment that “substantially limited” one or more major life activities, (b) he/she had a record of such an impairment, or (c) he/she was regarded by his/her employer of having such an impairment. In determining whether an employee was disabled, however, the courts had to consider mitigating measures. For example, if an employee had bipolar disorder that he/she managed with medication, and wasn’t substantially limited in a major life activity while on medication – then he/she wasn’t disabled for purposes of the ADA. Finally, the employee had to show that notwithstanding this disability, he/she could perform the essential functions of his/her job with or without an accommodation.

In addition to Sutton, the ADAAA overruled another U.S. Supreme Court case: *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*. This case had held that courts must strictly construe the terms “substantially limited” and “major life activity” when determining the existence of a qualifying disability, and that the employee further had to show his/her disability prevents or severely restricts the employee from “doing activities that are of central importance to most people’s lives.”

What Does This Mean?

With the new ADAAA, more cases will survive motions to dismiss and motions for summary judgment. Millions of employees not previously covered by federal law, will now have protection under the ADA as a person with a disability. Workers compensation cases, and an employee's return to work will be trickier to navigate. (Giving rise to potential ADA liability, and exposure to compensatory and punitive damages for workplace injuries.) Finally, some believe it will make ADA cases more susceptible to class allegations. However, we have not found this to have come to fruition in California over the last eight years. Unless there is a policy that is a per se violation of the ADA, the case-by-case analysis still make ADA employment cases difficult for plaintiffs to maintain as a class action. While plaintiffs may now have an easier time with the numerosity requirements of class cases, for purposes of a class action they still face difficulty with commonality and typically of claims due to the case-by-case nature of reasonable accommodations in ADA employment cases.

Summary of ADAAA 2008

- **Broad Construction** - The new law specifically identifies and rejects *Sutton v. United Airlines*, *Murphy v. UPS*, *Albertson's v. Kirkingburg* (collectively, the "Sutton Trilogy"), as well as *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* – Congress finds that these Supreme Court cases had narrowed the ADA's application too much.
- **Mitigating Measures** - A complete reversal of decisions that said medications, prosthetics, corrective surgery, hearing aids, and mobility devices are to be considered in assessing if someone is covered by the ADA. Impairments are to be evaluated in the unmitigated state (except that ordinary eyeglasses and contacts may be considered in mitigation).
- **Substantially Limits** – Congress states that whether an employee has a disability should not demand extensive analysis. The EEOC was directed to change its definition of "significantly restricts" to something that comports with the new broader view.
- **Expansion of Major Life Activities** – Congress expanded several new activities to the non-exhaustive list. This includes sleeping, concentrating, thinking, communicating, operation of major bodily functions (e.g., immune system, normal cell growth, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions), lifting, bending, and performing manual tasks.
- **Regarded-As Expanded** – Congress expanded regarded-as protection by prohibiting discrimination based on the employer's perception of mental or physical impairment, even if the impairment is not a perceived or actual disability under the ADA. Excluded from regarded-as protection are minor transitory impairments, e.g., those lasting less than six months.
- **Episodic Impairments** - Extends ADA protections to employees with episodic impairments or conditions in remission if the impairment would substantially limit a major life activity in the active state.
- **No Reverse Discrimination** - Clarifies that individuals without a disability cannot pursue a reverse discrimination claim on the basis of not having a disability.

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